

overtook the first cyclist immediately in front of it, cut into the road to the plaintiff's side and collided with the plaintiff's motor cycle which was on its correct side of the road. As a result the plaintiff fell on the grass verge on the left-hand side of the road and became unconscious.

One of the cyclists, P.W. 2, said that in fact there were four of them, cycling abreast in pairs. Jag Jit Singh and Sundra Sagram were cycling ahead and P.W. 2 himself was cycling behind with another Sikh. This Sikh was close to the edge of the road and P.W. 2 was on his right. The defendant's car overtook P.W. 2 and collided with the plaintiff's motor cycle. P.W. 2 admitted that he had known the motor cyclist a few months before the accident and did not make a statement to the police until about 6 months after the accident at the plaintiff's request.

For his part the defendant said that he was travelling on his correct side of the road when he saw the headlight of an oncoming motor cycle. He dipped and undipped his headlights for about four times because the motor cyclist was travelling on the crown of the road. The motor cycle headlight affected his vision and he could see for a distance of 8 to 10 yards only. His car was about 2 feet from the left edge of the road. The motor cycle then knocked into his car when he was on his correct side of the road. As already stated, he denied the presence of cyclists at the scene of the accident.

Of this conflicting evidence, the learned judge preferred that of the plaintiff and his witness to that of the defendant. But unlike the evidence relating to the presence or otherwise of cyclists at the scene of the accident which was purely oral, the evidence relating to the question whether or not the accident had been caused by the defendant driver overtaking a cyclist and thereby running into the path of the oncoming motor cyclist, was supplemented by independent evidence in the form of a sketch drawn by Sgt. A. Samad and four photographs taken by the police, all of the scene soon after the accident. Mr. Rajah argues that, tested against this independent evidence, the learned judge's finding cannot be supported and should be reversed. It is said that most of the broken glass deposited by the defendant's car onto the road was on the defendant's side of the road, and that this shows that probably the point of impact did occur on the defendant's side of the road or on the crown of the road as admitted by P.W. 2. In my judgment, this independent testimony was inconclusive and so no reliance could be placed on it either way. The sketch and the photographs only showed the position of the two vehicles after the accident. We have no means of being sure of the point of impact as there were no brake or skid marks, but we can be sure that neither vehicle became rooted to the spot immediately on impact and that the car being heavier must after impact have pushed the motor cycle some feet back. As regards the broken glass on the road, the first photograph shows that it was evenly distributed on both sides of the centre line. Though the learned judge referred to the sketch and photographs, he must I think have been influenced more by the oral evidence

produced by the two adversaries. The plaintiff said that the defendant overtook the cyclists and thus collided with the plaintiff. His witness said that the collision took place immediately after the defendant's car had overtaken him. The learned judge referred to this evidence in his grounds, and I think that he must have considered the admission by the plaintiff's witness in cross-examination that the collision took place "more or less in the centre of the road" (not, be it noted, "in the centre of the road") more than outweighed by this evidence, and so not meriting mention in his judgment. With respect, therefore, I think that the learned judge was justified in concluding that the accident occurred as a result of the defendant's negligence alone. On seeing the cyclists ahead of him, he should have either slowed down or waited to let the plaintiff through first; instead, feeling safe in his steel car, he decided nevertheless to overtake them, regardless of the consequences to the plaintiff. I would therefore dismiss this appeal as to liability.

As regards the appeal on interest, with respect I think that the learned judge was right there too.

For my part, therefore, I would dismiss this appeal with costs.

Gill F.J.: I agree with my brother Suffian that this appeal should be dismissed with costs.

The learned trial judge found as a fact that the collision was solely due to the negligence of the appellant. He made that finding on the evidence of the respondent and his witness, which evidence he preferred to that of the appellant. The collision took place as a result of and immediately after the act of the appellant in overtaking two cyclists riding abreast, so that the respondent had no chance to take any avoiding action. In the circumstances, the absence of any avoiding action on the part of the respondent cannot be held to be blameworthy.

Appeal dismissed.

Solicitors: *Yeap & Yeap; Lim Cheng Ean & Co.*

SHARIKAT LEE HENG SDN. BHD. v. PORT SWETTENHAM AUTHORITY

[F.C. (Ong C.J. (Malaya), Suffian and Gill F.J.) April 1, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 110 of 1970]

Port Authority — Bailment — Liability as bailee — Port Swettenham Authority By-laws, 1965, r.91(1).

Bailment — Port authority — Goods in custody — Liability for loss — Res ipsa loquitur — Burden of proof — Port Swettenham Authority By-laws, 1965, r.91(1).

Contract — Port authority — Contra proferentem rule — Application of — Effect of — Port Swettenham Authority By-laws, 1965, r.9(1).

Interpretation — Construction of Act and By-laws — Power to make rules as opposed to rules made in exercise of such power — Port Authorities Act, 1963, s.29(1) (g) — Port Swettenham Authority By-laws, 1965, r.91(1).

This was an appeal against the decision of the High Court ([1971] 1 M.L.J. 110) allowing an appeal from the decision of the magistrate allowing a claim by the plaintiffs/appellants for the sum of \$936 being the value of one case of locksets lost while in the custody of the defendant/respondent. The learned magistrate had found as a fact that 4 cases were delivered into the custody of the respondent, but when the appellants' agent went to collect them, only 3 cases were to be found in the respondent's warehouse. These findings were affirmed by the learned judge who heard the appeal. The magistrate took the view that, in the circumstances, the doctrine of *res ipsa loquitur* applied, that there was *prima facie* proof of negligence and that "the onus is thrown on the defendants to show that there was no negligence on their part or, at least, to give an explanation of the accident which is consistent with the absence of negligence." This the defendant failed to do: consequently rule 91(1) of the Port Swettenham Authority By-laws 1965 which provided that "The Port Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or for any other cause unless such loss... has been caused solely by the misconduct or negligence of the Authority or its officers or servants", did not relieve the defendant of the onus of proving that the loss was not due solely to its own negligence or that of its officers or servants. On appeal the learned judge took the contrary view of the rule and held that for the (present) appellants to succeed, the onus was upon them to show that the loss was due solely to the negligence of the respondent or its officers or servants.

The issue before the Federal Court was whether, on the true construction of rule 91(1) the operation of common law principles is by that rule excluded so as to shift the burden of proving how the goods came to be lost from the bailee for reward to the bailor.

Held. allowing the appeal: (1) the *contra proferentem* rule should apply to the construction of rule 91(1) just as much as it does to any exemption clause in a contract. The very fact that serious controversy had arisen as to whether the rule had placed the onus of proof on the bailor or bailee to show how the goods came to be lost, clearly demonstrates that it suffers from ambiguity;

(2) in the case of non-delivery all that the bailor need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exemption clause. Mere non-delivery, therefore, is *prima facie* evidence of negligence — this being a case of *res ipsa loquitur*. And "once negligence on the part of the defendants had been established and this negligence could have caused the loss, it was eminently reasonable to ask them to prove that in fact it did not.";

(3) upon the evidence in this case, the learned magistrate was fully justified in coming to the conclusion that the loss had been caused "solely by the negligence of the authority or its officers or agents." There was no suggestion on the part of the defence that it was otherwise — and pure speculation as to other possibilities cannot take the place of evidence;

(4) in this case the evidence was conclusive in the appellants' favour; the onus as a determining factor therefore, did not arise.

Cases referred to:-

- (1) *Moore v. R. Fox & Sons* [1956] 1 Q.B. 596.
- (2) *John Lee & Son (Grantham) Ltd. v. Railway Executive* [1949] 2 All E.R. 581, 583.
- (3) *J. Spurling v. Bradshaw* [1956] 2 All E.R. 121, 125.
- (4) *Hunt & Winterbotham Ltd. v. B.R.S. (Parcels) Ltd.* [1962] 1 Q.B. 617, 634.

- (5) *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.* [1937] 1 K.B. 534.
- (6) *Huyton-with Roby Urban District Council v. Hunter* [1955] 2 All E.R. 398, 400.
- (7) *Robins v. National Trust Co.* [1927] A.C. 515.

FEDERAL COURT.

Thean Lip Ping (P. Cumaraswamy with him) for the appellants.

James J. Puthucheary for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): This is an appeal against the decision of Abdul Hamid J. allowing an appeal from the decision of the magistrate at Kuala Lumpur allowing a claim by the plaintiffs (now the appellants) for the sum of \$936 being the value of one case of locksets lost while in the custody of the defendant (the present respondent).

The learned magistrate had found as a fact that four cases were delivered into the custody of the respondent, but when the appellants' agent went to collect them only three cases were to be found in the respondent's warehouse. These findings were affirmed by the learned judge who heard the appeal. The magistrate took the view that, in the circumstances, the doctrine of *res ipsa loquitur* applied that there was *prima facie* proof of negligence and that "the onus is thrown on the defendants to show that there was no negligence on their part or, at least, to give an explanation of the accident which is consistent with the absence of negligence:" *vide Moore v. R. Fox & Sons*.⁽¹⁾ This the defendant had failed to do: consequently rule 91(1) of the Port Swettenham Authority By-laws, 1965, providing that:—

"The Port Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or for any other cause unless such loss... has been caused solely by the misconduct or negligence of the Authority or its officers or servants",

did not relieve the defendant of the onus of proving that the loss was not due solely to its own negligence or that of its officers or servants.

The learned judge, however, took the contrary view of the rule and held that, for the appellants to succeed, the onus was upon them to show that the loss was due solely to the negligence of the respondent or its officers or servants. In other words, the burden of proof, unlike the position at common law, is, by reason of rule 91(1), cast upon the plaintiffs, the present appellants.

The issue in the present appeal, therefore, is whether, on the true construction of rule 91(1), the operation of common law principles is by that rule excluded so as to shift the burden of proving how the goods came to be lost, from the bailee for reward to the bailor. The learned judge was of the opinion that the rule must be construed in the light of section 29(1)(g) of the Port Authorities Act 1963 which reads:—

"The authority may with the approval of the Minister make by-laws for —

(g) limiting the liability of the authority in respect of any loss, damage or injury to any person, occurring without

the actual fault or privity of the authority (whether in any vessel operated or maintained by them or on any wharf, quay or other part of the port):”

Accordingly it was to him sufficiently clear “that the intention is not only to exempt the liability of the authority from mere loss but to affirm that the authority will only be liable for such loss if actual fault is established”. A bailor, therefore, cannot succeed in his claim by merely proving loss of his goods while in the custody of the authority, as bailee, but he must also prove that the loss was due to the negligence of the authority, its officers or servants.

With all due respect I disagree. In the first place, it is my view that, however wide the powers given by section 29(1)(g) of the Act to make a by-law, it is only the by-law itself which has to be construed, if full advantage was not taken to exempt the authority in a more comprehensive degree. The power to make rules, however wide, must not be confused with the rule made in exercise of such powers: the rule so made is not necessarily co-extensive with the power to do so.

In the second place, I am of opinion that the *contra proferentem* rule should apply to the construction of rule 91(1) just as much as it does to any exemption clause in a contract. The very fact that serious controversy has arisen as to whether the rule has placed the onus of proof on the bailor or bailee to show how the goods came to be lost clearly demonstrates that it suffers from ambiguity. As Evershed M.R. said in *John Lee & Son (Grantham), Ltd. v. Railway Executive*⁽²⁾:—

“We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended that, on the view for which they argued, it has a remarkably, if not an extravagantly, wide scope;... I think that the rule *contra proferentem* should be applied...”

In the third place, the appellants had pleaded that, towards proving negligence on the part of the respondent or its agents or servants, they would be relying on the doctrine of *res ipsa loquitur*. Having thus averred negligence against the respondent, they succeeded in proving the loss of one case while it was in the respondent's custody. In the case of non-delivery all that the bailor need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exemption clause: see Denning L.J. in *J. Spurling v. Bradshaw*.⁽³⁾ Mere non-delivery, therefore, is *prima facie* evidence of negligence—this being a case of *res ipsa loquitur*. And “once negligence on the part of the defendants had been established and this negligence could have caused the loss, it was eminently reasonable to ask them to prove that in fact it did not”: see *Hunt & Winterbotham Ltd. v. B.R.S. (Parcels) Ltd.*⁽⁴⁾ per Donovan L.J., who went on to say:—

“Similarly, in *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.*⁽⁵⁾ (another case of a claim in negligence)

it was held that the circumstances of the loss of goods by a bailee may justify the inference of negligence as the cause of the loss, which inference it would be for the bailee to displace.”

On the facts the defence plainly failed. In the magistrate's court the respondent called as its sole witness the assistant traffic manager. He said he had rejected the claim purely because his out-turn showed that only three cases were delivered to the consignee — an out-turn being based on the authority's own invoices prepared on the date the goods were delivered to the consignee. “Our invoices”, he said, “show goods which were delivered. Goods after landing cannot go anywhere else. There are staff in each shed... In the past goods have disappeared from the shed — but only a minute percentage of them”. The learned magistrate's positive finding of fact, that four cases were actually received by the respondent, was a rejection of the defence that only three cases had been landed from the ship. Loss of one case while in the respondent's custody was accordingly proved to the hilt. No attempt was made on the part of the respondent's assistant traffic manager to explain the disappearance of the missing case — other than a suggestion that possibly “the second tally sheet could have been forged”. Proof, however, that all four cases had actually been deposited inside “the sixth shed at the sixth wharf”, disposed also of that theory. In the result there were the admissions that “goods after landing cannot go anywhere else” and that the sheds were looked after by the authority's own staff — from which premises the inference might reasonably be drawn, that the loss was “caused solely by the... negligence of the authority or its officers or servants.” The learned magistrate so found in favour of the appellants. In my opinion a decision based on such finding should not have been disturbed. In this connection a most appropriate authority is to be found in *Huyton-with-Roby Urban District Council v. Hunter*⁽⁶⁾ in which a dispute arose between the frontager and the local authority whether Thingwell Lane was a highway repairable by the inhabitants at large. The justices found in favour of the frontager, but a Divisional Court of the Queen's Bench Division allowed the local authority's appeal against that decision, holding that, once it was shown that no public money had been spent on the lane, the onus of establishing that the lane was a highway repairable by the inhabitants at large was shifted to the frontager, and that he had not discharged that burden. On appeal held: that the justices, having had before them evidence on which they could and did reach a determinate conclusion of fact, their decision could not be interfered with; and, accordingly, although the legal burden of proof throughout lay on the local authority, yet the evidence was not so evenly balanced that the incidence of the burden of proof was the deciding factor. On the legal burden of proof and the shifting weight of evidence Denning L.J. (as he then was) said:—

“That (Thingwell Lane is a public highway) being a finding of fact by the justices, it cannot be reversed on case stated unless there was no evidence to support it, and in my view there was evidence to support it.

The Divisional Court have taken a different view. They said that, once it appeared that no public money had been spent on this road, then the burden of proof shifted on to the frontagers to show that it was a highway repairable by the inhabitants at large. I cannot share that view...

The Divisional Court made a mistake in failing to distinguish between a legal burden imposed by law and a provisional burden raised by the state of the evidence. Although the legal burden rests throughout on the local authority, they go some way to discharge it when they call evidence to show that no public money has ever been spent on the road. When this is done, a provisional presumption arises that the road is not a public road, but it is by no means conclusive. As the case proceeds, the evidence may first weigh in favour of the view that it is not a public road, and then against it, thus producing a burden — sometimes apparent, sometimes real — which may shift from one party to the other, or may remain suspended between them. That is not a legal burden, however, but only a provisional burden — a burden raised by the state of the evidence — from which the court may draw an inference one way or the other, but is not bound to do so. At the end of the case the court has to decide as a matter of fact whether the road is repairable by the inhabitants at large or not. If it can come to a determinate conclusion, no question of the legal burden arises; but, if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the legal burden comes into play and requires the court to say that the local authority have not proved the case...

The part played by a legal burden of proof was well stated by Viscount Dunedin in *Robins v. National Trust Co.*⁽⁷⁾ (at p. 520): ‘...onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.’

Upon the evidence given on both sides in the instant case, I think the learned magistrate was fully justified in coming to the conclusion that the loss had been caused “solely by the negligence of the authority or its officers or agents”. There was not a ghost of a suggestion on the part of the defence that it was otherwise — and pure speculation as to other possibilities cannot take the place of evidence.

Much of the argument of this appeal, however, has been devoted to the question whether rule 91(1) has the effect of shifting the onus from the bailee to the bailor of proving how the loss came about. I need hardly repeat that the very fact that the question of onus is so hotly disputed is proof enough that the rule suffers from ambiguity and on that account the *contra proferentem* rule ought to be applied. In the absence of clear and unequivocal language to the contrary, I am of opinion that the onus still lies on the authority to show that it has taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack of care on its part. In the instant case the evidence was conclusive in the appellants’ favour; the onus as a determining factor, therefore, did not arise. I would accordingly allow the appeal and restore the judgment of the learned magistrate, with costs to the appellants in both appeals.

Suffian and Gill F.JJ. concurred.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

A PESUROHJAYA IBU KOTA KUALA LUMPUR v. PUBLIC TRUSTEE & ORS.

[O.C.J. (Raja Azlan Shah J.) April 9, 1971]

[Kuala Lumpur — Originating Summons No. 440 of 1970]

Local Government — Squatters — Removal of — Costs and compensation — Recovery of — Attachment of land — Town Boards Enactment (F.M.S. Cap. 137), s. 50 — Essential (Clearance of Squatters) Regulations, 1969, regs. 10(2) and 10A(1).

Interpretation of Statutes — Amendment to Regulations — Retrospective operation — Effect of.

Practice and Procedure — Nature of action — Whether to be proceeded by writ or originating summons.

This was a claim by way of originating summons for costs and compensation amounting to \$338,378.45 for removal of squatters by the applicant. The applicant applied for an order that the holding from which the squatters had been cleared, be attached and sold pursuant to the provisions of section 50 of the Town Boards Enactment (Cap. 137) and regulations 10(2) and 10A(1) of the Essential (Clearance of Squatters) Regulations 1969. The respondents are co-proprietors of the said land. They contended that the procedure adopted by the applicant was wrong in law because disputed questions of fact and law were involved. They further contended that regulation 10A was an amendment to the Essential (Clearance of Squatters) Regulations and as such it could not be enforced against the respondents in respect of the squatter clearance carried out on November 30, 1969.

The Essential (Clearance of Squatters) Regulations, 1969 came into force on October 2, 1969. On February 24, 1970, the Regulations were amended and such amendment was deemed to have come into force on October 2, 1969. Demolition work was done on November 30, 1969, that is, before the amendment to the Regulations was made. However, the respondents were billed on March 31, 1970, that is, after the amendment.

Held, allowing the claim: (1) the general rule is that there is a presumption against giving statutes a retrospective operation. The presumption is that the legislature does not intend what is unjust. However, the rule is a mere presumption and as such it may be rebutted by express words in the Act or by circumstances sufficiently strong to replace it. In the present case it was clearly stated in the Regulations that the amendment was to take effect from a date antecedent to its making. Regulation 10A clearly governed the instant case because the amendment had retrospective effect;

(2) when a question of fact is at issue the action is to be by way of writ and not by originating summons. In this case the disputed question of fact would be as to the number of squatter families removed from the land. But with the amendment the method of computing was by way of area. Therefore the question of how many squatter families were removed was not relevant and hence not a fact crucial to the determination of the case. Therefore the procedure adopted by the applicant was in order.

Whether the compensation levied was fair and equitable considered.

The following cases were cited in argument: *Foon Seong v. Chan San Choon* [1947] M.L.J. 85; *Ong Yok Chu v. Yong Teck Fong* [1960] M.L.J. 292; *Ng Wan Siew v. Teoh Sin* [1963] M.L.J. 103; *E'Singam v. Dr. Sundram & Ors.* [1960] M.L.J. 91; *Ponniah v. Chinniah* [1961] M.L.J. 66; *O.C.B.C. v. The Commissioner of the Federal Capital* [1963] M.L.J. 294; *West v. Gwynne* [1911] 2 Ch. 15; *Athlumney, Re* [1898] 2 Q.B. 551.

ORIGINATING SUMMONS.

J. L. Tan for the applicant.

V. L. Kandan for the respondents.